82-1341

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RICHARD T. WOOD,
Plaintiff-Respondent

v.

DIAMOND M DRILLING COMPANY, ET AL,
Defendants-Petitioners

On Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

J. DOUGLAS SUTTER
2600 Two Allen Center
Houston, Texas 77002
(713) 651-0600
Attorneys for Defendants-Petitioners

Of Counsel:
ROSS, GRIGGS & HARRISON

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

I. Whether a seaman can recover maintenance after he voluntarily obtains other employment and, if so, whether any maintenance award should be offset by the earnings from such other employment and by the jury award for loss of past wages.

II. Whether a plaintiff can recover loss of future earnings where, at the time of trial, he is gainfully employed earning more money than he was at the time of his injury.

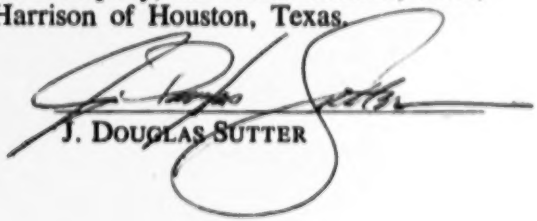
III. Whether a plaintiff can recover damages both for loss of life's enjoyment and for pain, suffering and mental anguish.

LIST OF PARTIES

The undersigned, counsel of record for Defendants-Petitioners Diamond M Drilling Company and Diamond M International Company, certifies that the following parties have an interest in the outcome of this case.

(1) Richard T. Wood, and his counsel, Mandell & Wright of Houston, Texas.

(2) Diamond M Drilling Company and Diamond M International Company, and their counsel, Ross, Griggs & Harrison of Houston, Texas.



J. DOUGLAS SUTTER

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To The Honorable Justices of The Supreme Court
Of The United States of America:

Petitioners, Diamond M Drilling Company and Diamond M International Company, respectfully show:

OFFICIAL AND UNOFFICIAL REPORTS

The only report of this case of which Petitioners are aware is found in Volume 691, Federal Reporter, 2d Series, at Page 1165.

STATEMENT OF GROUNDS FOR JURISDICTION

This Petition is in appeal from a judgment entered on the 9th day of November, 1981, in the United States District Court for the Southern District of Texas, Houston Division, the Honorable George E. Cire presiding.

On appeal to the United States Court of Appeals for the Fifth Circuit, the judgment of the District Court was affirmed on the 22nd day of November, 1982. Petitioners filed a Petition for Rehearing, which was denied on the 16th day of December, 1982.

This Honorable Court has jurisdiction to consider this Petition pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case does not involve any statutes or regulations other than that conferring jurisdiction of this appeal, *supra*, and that conferring original jurisdiction upon the District Court below, 46 U.S.C. § 688, commonly known as the "Jones Act".

STATEMENT OF THE CASE

(1) Statement of Facts.

Plaintiff's claim arises out of an incident which occurred on the 5th day of July, 1978, in which Richard T. Wood sustained an injury to his left hand aboard the

semi-submersible drilling rig DIAMOND M NEW ERA off the coast of New Jersey.

On the occasion in question, Richard T. Wood was employed by Diamond M Drilling Company as a roughneck or floorhand. Mr. Wood was painting and doing general maintenance on the rig floor when he was called to the moon pool area of the rig. According to Mr. Wood, the fill-up line had become disengaged from the stack, and he and other men were sent to make repairs. Mr. Wood and a co-worker then erected a scaffold to conduct their work on the fill-up line. The job was done by four workers: the Plaintiff-Respondent, another roughneck, a welder and a derrickman. In order to help pass tools to the welder and his helper, Respondent positioned himself, in a sitting position, on the scaffolding about halfway between the bracket and the stack. Mr. Wood, without noticing, held onto what is known as a tensioner cable for balance. Tensioner cables come from large pulleys or sheaves underneath the rig floor and run to the respective corners of the rig, serving as an integral part of the system which keeps the stack upright in a rig in firm contact with the ocean floor. The tensioner cable moves in and out of the various pulleys as the rig rocks and sways with ocean swells. Mr. Wood grasped the cable at a point dangerously near one of the pulleys, and when the rig and cable moved with a swell of the ocean, the cable and the Respondent's left hand moved into the pulley mechanism, causing injuries mentioned hereinabove.

Mr. Wood was given emergency medical care at the rig infirmary and was taken by helicopter to a shoreside hospital shortly thereafter. He received extensive treatment, surgery and therapy from various physicians and medical institutions thereafter.

On or about September 11, 1979, Respondent voluntarily obtained employment with Sedco, Inc. as an administrative assistant in the financial department, earning $1,037.50 base pay every two weeks. Respondent stipulated that he was paid $250.00 per week by Diamond M from the date of his injury until at least the time of his employment with Sedco, Inc. During his convalescence, Mr. Wood stayed in New England with his parents, who provided him with food and lodging.

Regarding his plans for the future, Mr. Wood testified that he was pursuing, at the time of trial, a degree of Master of Business Administration while working at Sedco, Inc. He already held a Bachelor of Arts college degree. Mr. Wood testified that he is interested in becoming a teacher and pursuing a career as a business executive, goals which he has held for some time.

(2) Statement of Proceedings and Disposition in the Courts below.

This case was commenced by Richard T. Wood as Plaintiff against Diamond M Drilling Company as the original Defendant. Diamond M International Company, the owner of the DIAMOND M NEW ERA, was subsequently added as an additional party Defendant. The Plaintiff's action was filed under Rule 9(h), Federal Rules of Civil Procedure, and his claim is alleged to have been brought under the "Jones Act", 46 U.S.C. § 688 *et seq.*, and the general maritime law of the United States.

The issues of negligence, unseaworthiness, and damages were tried to a jury, and the issue of maintenance was submitted to the District Court by agreement.

In their answers to eight special interrogatories, the jury found that both parties were negligent, allocated 27% of the fault to Mr. Wood, found the DIAMOND M NEW ERA seaworthy, and found damages totalling $267,000.00. The District Court made separate findings of fact concerning maintenance. Defendants' post-verdict Motion to Disregard Jury Findings and for Judgment was filed on November 2, 1981, and was denied November 9, 1981, the same date that judgment was entered. Defendants filed their Motion for New Trial on November 16, 1981, which was denied on November 25, 1981.

Both parties timely filed Notices of Appeal, on December 8, 1981 and December 24, 1981, respectively. The case was submitted to the United States Court of Appeals for the Fifth Circuit upon written briefs. In a published opinion dated November 22, 1982, the Court of Appeals affirmed the lower court judgment. Defendants timely filed their Petition for Rehearing, which was denied on December 16, 1982.

Defendants-Petitioners now tender this their Petition for Writ of Certiorai to the United States Court of Appeals for the Fifth Circuit.

BASIS FOR ORIGINAL JURISDICTION IN THE DISTRICT COURT

Plaintiff's Complaint was filed as a suit for personal injury pursuant to Rule 9(h), Federal Rules of Civil Procedure, as a claim within the admiralty and maritime jurisdiction of the United States pursuant to 28 U.S.C. § 1333, 46 U.S.C. § 688 *et seq.*, and the general civil and maritime law.

ARGUMENT

POINT I

A SEAMAN CANNOT RECOVER MAINTENANCE AFTER HE VOLUNTARILY OBTAINS OTHER EMPLOYMENT AND, IN ANY EVENT, ANY MAINTENANCE AWARD SHOULD BE OFFSET BY THE EARNINGS FROM SUCH OTHER EMPLOYMENT AND BY THE JURY AWARD FOR LOSS OF PAST WAGES.

As has been noted in the Statement of Facts, Richard Wood voluntarily obtained employment with Sedco, Inc. on or about September 11, 1979. Approximately two weeks later, upon learning of Mr. Wood's other employment, Diamond M stopped making the $250.00 per week payments it had been making since the Respondent was injured. There is no testimony anywhere in the record, nor is there any contention, to the effect that Mr. Wood was forced to return to work out of economic necessity when he did. Therefore, an award of maintenance is not appropriate during this period, because the purposes of such payments have been served by Mr. Wood's other employment. Alternatively, Respondent's earnings with Sedco should be credited or offset against any maintenance which would otherwise be due from Petitioners, resulting in the maintenance obligation being entirely subsumed by the earnings from Respondent's other employment. This is an issue which has been passed upon by several district and appellate courts,[1] but not

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1. *Perez v. Suwanee S. S. Co.*, 239 F.2d 180, 181 (2nd Cir. 1956); *Wilson v. United States*, 229 F.2d 277, 280-81 (2nd Cir. 1955); *Rodgers v. United States Lines Co.*, 189 F.2d 226, 228 (4th Cir. 1951); *Inter Ocean S. S. Co. v. Behrendsen*, 128 F.2d 506, 508 (6th Cir. 1942); *Loverich v. Warner Co.*, 118 F.2d 690, 694 (3rd Cir. 1941); *Colon v. Trinidad Corp.*, 188 F.Supp. 97, 100 (S.D. N.Y. 1960); *Scott v. Lykes Bros. S. S. Co.*, 152 F.Supp. 104, 106 (E.D. La. 1957).

by this Court, and an issue which is of great significance to the maritime industry.

Maintenance is an allowance designed to cover the expenses a seaman incurs in acquiring food and lodging ashore during illness or disability. *Caulfield v. AC&D Marine, Inc.*, 633 F.2d 1129, 1131 (5th Cir. 1981). However, the duty of a shipowner to pay a seaman maintenance does not extend beyond the seaman's need. *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 528, 58 S.Ct. 651, 82 L.Ed. 993, 996 (1937). Thus, when a seaman is hospitalized without expense in a Marine hospital, he is not entitled to maintenance and cure for that period. *Calmar, supra*, 303 U.S. at 531. Nor must a shipowner pay maintenance to a seaman who convalesces at the home of his parents or wife without incurring expense or liability for his support. *Johnson v. United States*, 333 U.S. 46, 50, 68 S.Ct. 391, 92 L.Ed. 468, 472 (1948). Because the limited purpose of maintenance is to make the seaman whole, it logically follows that there should be no such duty for periods when the seaman, though perhaps not yet at the magical point of maximum medical benefit, either does in fact obtain equivalently gainful employment or is able to do so. Where a seaman's return to work is voluntary and not brought on by economic necessity, holding the seaman accountable for his earnings carries out the basic purpose of making the seaman whole and creates neither an undue incentive to the shipowner for withholding payments, nor pressure compelling a premature return to work. *Vaughan v. Atkinson*, 360 U.S. 527, 529, 82 S.Ct. 997, 8 L.Ed.2d 88, 96 (1962) (Stewart, J., dissenting). In *Vaughan*, this Court held that where a shipowner's callous and deliberate disregard of its main-

tenance obligation results in the seaman prematurely returning to work out of pure economic necessity, to keep food in his stomach and a roof over his head, the shipowner may not credit the seaman's earnings during this time against its maintenance obligation. The case at bar presents the opposite situation.

Because Respondent was employed for a significant period of time prior to trial, and because the purpose of maintenance has been fulfilled thereby, there should have been no duty on the part of the Petitioners to pay maintenance to Mr. Wood. A shipowner should not bear the burden the seaman has already been relieved of for whatever reason. *Gauthier v. Crosby Marine Service, Inc.*, 499 F.Supp. 295 (E.D. La. 1980).

This is not a case where the injured seaman has been forced to seek employment due to economic necessity resulting from the shipowner's failure to pay maintenance and cure. To allow such an award would only serve to encourage an injured seaman to remain idle while a denial of the award, under the facts of this case, visits no harm upon the Respondent, does not encourage the shipowner to withhold maintenance, and leaves the seaman whole. Therefore, Respondent is not entitled to an award of maintenance for the period from October 4, 1979 to July 1, 1981, during which he voluntarily obtained gainful employment.

The appellate court, in passing on this point, opined that Petitioners are construing *Vaughan* too narrowly, and held that:

> "Though . . . Wood is not entitled to a windfall, we do not believe that, under *Vaughan*, he should be subject to a forfeiture of his right under the law for having returned to work."

Yet if the maintenance award is allowed to stand, Respondent will have received money from *three* different sources prior to trial. First, there is the award for maintenance. Second, there is the sum of money Mr. Wood earned at Sedco. Third, there is the jury's award of $16,000 for loss of past wages. Petitioners submit that both Mr. Wood's Sedco earnings and the award of past lost wages should be offset against the maintenance award, if same is allowed to stand. This is in accordance with the rule that because lost wages are inherent in both an action for damages and a claim for maintenance, there must *not* be a duplication in the final award. *Blanchard v. Cheramie*, 485 F.2d 328, 330 (5th Cir. 1973); *Cates v. United States*, 451 F.2d 411, 417 (5th Cir. 1971); *Vickers v. Tunney*, 290 F.2d 426, 435 (5th Cir. 1961). Any maintenance which may have been due and owing to Respondent was subsumed by the jury's award of lost past and future wages and Mr. Wood's earnings at Sedco. The award of maintenance to Respondent was a duplication of the jury verdict and of the judgment thereon, in conflict with Fifth Circuit precedent. The Court of Appeals has, in affirming, ruled in violation of its own established rules of law.

POINT II

A PLAINTIFF MAY NOT RECOVER FOR LOSS OF FUTURE EARNINGS WHERE, AT THE TIME OF TRIAL, HE IS GAINFULLY EMPLOYED EARNING MORE MONEY THAN HE WAS EARNING AT THE TIME OF HIS INJURY.

The issue of Respondent's damages was submitted to the jury in the form of a single Special Interrogatory

which, together with the jury's answers, reads in pertinent part as follows:

> 8. From a preponderance of the evidence, what amount of money paid now in cash, if any, would fairly and reasonably compensate the Plaintiff, Richard T. Wood, for the injuries he has sustained?
>
> Answer in dollars and cents, if any, as follows:
>
> a. for wages lost up to the date of trial as a result of the injury;
>
> $16,000.00 (Sixteen Thousand)
>
> b. for the loss of future earnings caused by the injury;
>
> $200,000.00 (Two Hundred Thousand)
>
> * * *

The evidence to support any such award is extremely sketchy and speculative. As has been pointed out in the Statement of Facts, *supra*, Richard Wood became employed prior to trial, by Sedco, Inc., earning in excess of $24,000.00 per year, a sum greater than he was earning with Defendants-Petitioners. There was no evidence whatsoever that Respondent intended to remain a rig worker for the remainder of his life; to the contrary, his testimony showed his desire to make his way in the business world. Furthermore, although Mr. Wood testified concerning some difficulties he might have with performing heavy physical labor, his educational background and current employment are indicative of the fact that he suffers from no condition which limits his opportunity for gainful employment.

The proof necessary to support a recovery for loss of future earning capacity is well-established. The formula

to determine loss of future earning capacity and lost future wages is clearly set forth in *Petition of United States Steel Corp.*, 436 F.2d 1256 (6th Cir. 1970):

> "The claimant must first establish his normal annual earning capacity, *which in the absence of evidence of special circumstances indicating an ability to rise beyond his prior level of employment*, would consist of a projection of claimant's earnings history, taking into account *all available* data relevant to wage adjustment. . . . Next the claimant *must* establish the reduction, if any, in his earning capacity proximately resulting from the injury by showing the existence of some condition which demonstrably limits his opportunities for gainful activity."

436 F.2d at 1270. (Emphasis added). *See also, Wiles v. N.Y., C. & St. L. R.R. Co.*, 283 F.2d 328, 331 (3rd Cir. 1960); *Conte v. Flota Mercante del Estado*, 277 F.2d 664, 669 (2d Cir. 1960). Respondent clearly did not meet this test to show lost future earnings or lost future earning capacity, and the courts below have erred in not applying the relevant legal test to the evidence.

In *Kratzer v. Capital Marine Supply, Inc.*, 490 F. Supp. 222 (M.D. La. 1980), *aff'd*, 645 F.2d 477 (5th Cir. 1981), the district court made the following conclusion of law regarding loss of future earnings:

> "13. Kratzer is also entitled to past and future loss of earnings. * * * As of the trial date, he had lost $30,000.00 in past wages.
>
> Plaintiff anticipates that he will receive his college degree in 1982, and under these circumstances, he is entitled to future loss of wages for five years, *a period which will allow him to complete his edu-*

> *cation and establish himself in a new position paying as much or more than he was earning on the river.* * * *."

490 F. Supp. at 230. (Emphasis added). In this case, there was no evidence that it was Respondent's goal to remain a rig worker for the remainder of his life. Furthermore, Mr. Wood had already obtained his college degree and was well on his way toward a post-baccalaureate degree. He is *already* established in a position paying as much or more than he was earning as a rig worker.

In *Clements v. Chotin Transportation, Inc.*, 496 F. Supp. 163 (M.D. La. 1980), the plaintiff was employed as a head deckhand and tankerman when he sustained two separate injuries to his back, the second occurring on November 6, 1978. The District Court found that the plaintiff was enrolled in college and would get his degree in approximately two years. The Court concluded that the plaintiff was entitled to recover the wages he lost as a result of the second accident. Under the circumstances, the District Court awarded three months salary based on a twenty-four day per month cycle and thereafter lost daily wages on the basis of a thirty day on, fifteen day off scale until December of 1979. Finally, the Court concluded that the evidence presented on loss of future income after December of 1979 was *purely speculative,* and accordingly denied the plaintiff's claim for loss of future wages after that date. 496 F. Supp. at 168-69.

In its opinion in this case, the Fifth Circuit has departed from established precedent regarding recovery for loss of future earnings. The Fifth Circuit, in its opinion, treated this argument as one merely challenging the sufficiency of the evidence to support the jury's award. This

is, in fact, a point of law, concerning whether there can be an award for loss of future income in a situation where the claimant is earning more money after the accident than he was previously. Petitioners submit that in such a case, there can be no such award under the established tests for proving and recovery of loss of future earnings.

Petitioners submit that, because of the uncontradicted testimony regarding Respondent's current employment, he may not recover for loss of future earnings.

POINT III

A PLAINTIFF MAY NOT RECOVER BOTH FOR LOSS OF LIFE'S ENJOYMENT AND FOR HIS PAIN, SUFFERING AND MENTAL ANGUISH.

The damages issues, all embodied in Special Interrogatory No. 8, requested the jury to determine Plaintiff's past and future pain, suffering, and mental anguish[2] and also inquired about his loss of life's enjoyment in the past and in the future.[3] The jury awarded a total of $31,000.00 for past and future pain, suffering, and mental anguish, and separately awarded $20,000.00 for past and future loss of life's enjoyment.

The law is clear that loss of life's enjoyment is to be included in any award for pain, suffering and mental anguish, and as such is not to be considered as a separate element of damage. In *Dugas v. Kansas City Southern Rwy. Lines*, 473 F.2d 821, *reh. en banc denied*, 475 F.2d 1404 (5th Cir. 1973), the Court of Appeals held that:

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2. Special Interrogatory 8(c) and 8(d).

3. Special Interrogatory 8(e) and 8(f).

> ". . . the effect of injuries upon the normal pursuits and pleasudes of life is an included item, not a separate one, that is, the normal pursuits and pleasures of life are to be included as a part of pain, suffering, and inconvenience. It is not a factor to be separately measured as an independent ground for damages."

473 F.2d at 827. *Dugas* was a suit under the Federal Employers' Liability Act, and as such is applicable to this Jones Act action.

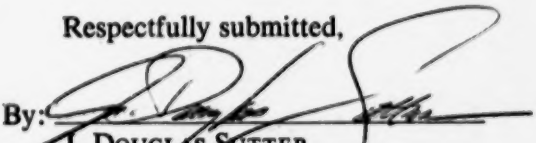
In light of the foregoing authority, the award for loss (past and future) of life's enjoyment is a duplication of the award for pain, suffering and mental anguish, and it was error to enter and affirm the judgment awarding both elements of damage.

The Court of Appeals in this case found no objection on the record to the simultaneous submission of these subissues, and therefore did not reach the merits of this Point. Petitioners submit that this argument was presented to the trial court in the form of various motions, and that the Court of Appeals erred in failing to consider this Point in accordance with the established rule of law.

CONCLUSION

For the reasons stated in Points I through III, Petitioners request that their Petition be granted, and that the holding of the Court of Appeals be reconsidered.

Respectfully submitted,

By: 

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